

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE BRUNO,

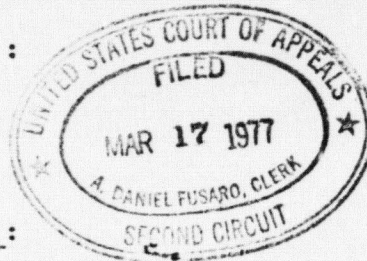
Plaintiff-Appellant,

-against-

JOSEPH A. CALIFANO, JR., Secretary of Health,
Education and Welfare,

Defendant-Appellee.

DOCKET NO. 77-6001



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

Respectfully Submitted,

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Plaintiff-Appellant,

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THE MEDICAL EVIDENCE OF RECORD
DICTATES A REVERSAL OF THE
SECRETARY'S DENIAL OF BENEFITS

The pivotal finding in the law judge's decision, upon which
his ultimate conclusion that the claimant is not disabled must
stand or fall, is:

that the medical evidence would not
support a finding that the claimant's
complaints [of pain] are valid (Tr. 17).

Given the massive corroboration by the medical evidence
for the claimant's reports of pain, the Secretary now correctly

*Cont'd. from p. 6.

Some orthopedic surgeons still prefer the reduction-immobilization method of treatment, if not for all compression fractures, at least for the more severe ones...

1A Gray's Attorney's Textbook of Medicine ¶14.13 (1) (3d ed. 1976).

Since the latter passage more accurately describes the treatment administered to the claimant by Dr. Wise and other doctors at the Hunts Point Center, it is more germane as an indication of the severity of claimant's back ailment. This view is further supported by the absence over the time period covered by the medical evidence of any reported improvement in the claimant's condition.

The Secretary's next tactic is to isolate one of the medications administered to the claimant, Darvon Compound, and to quote a medical reference as indicating it is prescribed for "mild to moderate pain." (Brief for Appellee at 7). A different picture emerges when the other medications prescribed for the claimant are considered (Tr. 117). Most significantly the drug Robaxin, which, along with Darvon is directed to be taken four times daily, is a muscle relaxant which is:

indicated as an adjunct to rest, physical therapy, and other measures for the relief of discomforts associated with acute, painful musculo-skeletal condition.

Physicians Desk Reference (1975) p. 1225. Other medications administered to the claimant include Lasix, Sergasil, and Ser Ap Es, all anti-hypertension drugs, and Orinase, an anti-diabetic medication which lowers blood sugar (Tr. 117).

Finally the Secretary argues that since Dr. Wise hypothetically suggested the possible advisability of a spinal fusion, claimant's back condition is remediable. (Brief for Appellee at 17). Neither of the cases cited by the Secretary in support of the proposition that remediable ailments are not disabling involve spinal fusion operations. In Ratliff v. Celebrezze, 388 F.2d 978, 981 (6th Cir. 1964), it was stated:

recognizes the small likelihood of prevailing on the basis of this argument. He therefore abandons it and seeks to rest his attack on the credibility of the claimant's testimony solely on his work history. (Brief for Appellee, pp. 19 - 23).

The Secretary's position as set forth in the aforementioned section of his Brief would appear to be that the appellant's claim must fall because he has not satisfactorily answered the question on the Secretary's application form (No. 5 (a) Tr. 67) asking for a precise date before which he was capable of engaging in substantial gainful activity, and after which he was totally disabled. The claimant's condition simply does not lend itself to such precision. The picture that is indisputably presented by the evidence in this case is one of a gradually deteriorating back condition from an initial injury which, over a substantial period, perhaps years, and compounded by other ailments, ripened in the months preceding his application into a full disability.

As this process of deterioration took its course the claimant continued to engage in remunerative activity of a strenuous nature, so it is not surprising that he would report the experience of pain and discomfort during this period (Tr. 78). The claimant does not contend he was under a disability during these periods of employment. Nevertheless, the fact that the claimant persevered in the face of such pain to support himself

and his wife may not be held against him, as the Secretary attempts to do (Brief for Appellee at 21). In Hanes v. Celebrezze, 337 F. 2d 209, 214 (4th Cir. 1964), the court held:

Where the evidence discloses that the claimant, in spite of severe and disabling impairments, is compelled to perform work to "keep the wolf from the door," his earnings should be given little significance. [Citations omitted].

Similarly, in Wilson v. Finch, 325 F. Supp. 196 (W.D.N.C. 1970), it was stated:

Where the plaintiff, despite his disablement, chooses to support himself or his family, he should not be penalized because of his endurance in the face of pain and adversity.

See also Leftwich v. Gardner, 377 F. 2d 287, 290 (4th Cir. 1967). *

* Moreover, it is a well-established medical characteristic of back ailments that after an initial injury they may remain in states of relative dormancy only to flare up at much later dates:

Many patients with low back affections work and carry on a "normal" life until trauma aggravates the pre-existing lesion. This may be because the complaint of backache is so common that hardly anyone, especially the patient, gives it much attention until trauma aggravates the pain.... The presence of a pre-existing lesion (injury or disease), focused in its location by the trauma, firmly anchors the cause of the back disability in the patient's mind.

Nathan Flaxman, M.D., "Low Back Affectations - Aggravation of Pre-Existing Injuries," in Sol Schrieber, ed., Medico-Legal Aspects of Back Injury Cases, p. 266 (1965).

The cases cited by the Secretary (Brief for Appellee at 22), in support of his argument that the claimant's work history invalidates his reports of pain all* have in common the feature of insufficient or limited medical evidence submitted by the claimant. In Adams v. Flemming, 276 F. 2d 901, 904 (2d Cir. 1960), for example, this court held:

The significance of any mention of inability to work in the medical reports cannot be overlooked. Were this the fact surely some doctor would have been willing to make such a statement.

* Claimant is puzzled by the Secretary's citation of Johnson v. Finch, 437 F. 2d 1321 (10th Cir. 1971) since it is devoid of any evidence of employment while under an alleged disability. In King v. Gardner, 370 F. 2d 652 (6th Cir. 1967), it was noted:

The testimony does not disclose a complete history of just how often his seizures occurred.

Since the medical evidence in this case is extensive and provides a complete picture of the claimant's condition, the cases advanced by the Secretary are clearly distinguishable.

The Secretary claims the record contains no evidence of the worsening of the claimant's condition (Brief for Appellee at 21, 22).^{*} The conclusion that the claimant's condition has undergone a substantial deterioration arises incontestably, as pointed out in Appellant's Brief at p. 28, from a comparison of the physical limitations to which the law judge himself found the claimant to be subject (Tr. 16) and the physical requirements of claimant's former occupations (Tr. 80). The fact that the claimant has not produced a day-by-day description of this process of deterioration, specifying, for instance, the precise day on which he became unable to bend or stoop, in no way detracts from this conclusion. The central fact no amount of obfuscatory discussion of the claimant's work history should be permitted to obscure is that the claimant through his own testimony and supporting medical evidence satisfied whatever burden he had of showing his disablement at least as of March 28, 1975, the date of the hearing herein, if not before.

The Secretary attempts to buttress the foregoing argument by making the rather astonishing claim that the claimant is capable of returning to his prior forms of employment (Brief for Appellee at 13). As hereinabove pointed out, such an

^{*} The Secretary also repeatedly makes the claim that the claimant sought no work after being laid off (Brief for Appellee at 4, 5, 20, 22). This is simply not true. In response to the question, "Now, between the time you were laid off and the time in which you were hospitalized, did you attempt to go back to the Remarsie Company and resume your previous work? The claimant responded, "yes" (Tr. 45).

argument makes no sense whatsoever in light of the medical evidence in this record. The Secretary then claims this position receives support from the vocational expert's opinion that the claimant is capable of employment as a "packer" (Brief for Appellee at 13, 24). This absurd argument falls of its own weight. In the claimant's former employment he was a soap-box packer (Tr. 80) a job requiring the lifting and manipulation of boxes of soap. The job of "packer" as mentioned by the vocational expert was one example of the general category of "bench assembly and processing jobs" (Tr. 53) all of which involved handling of small mechanical or electrical implements.

The support the medical evidence in this case provides for the appellant's claim is virtually uncontradicted. As this court held in Gold v. Secretary of Health, Education and Welfare, 463 F. 2d 38, 42 (2d Cir. 1972):

The expert opinions of plaintiff's treating physicians as to plaintiff's disability... are binding on the referee if not controverted by substantial evidence to the contrary.

Claimant suffers from multiple ailments, one of which, his back condition, is particularly serious.* Three of the four physicians

* The Secretary attempts to minimize the seriousness of the claimant's back condition by paraphrasing a passage on the treatment of compression fractures which results in a rapid "return to normal activities." He then unpersuasively conjectures that the medical evidence indicates that "plaintiff probably sustained this type of injury." (Brief of Appellee at 4). However the next sentence of the authority cited by the Secretary reads:

whose reports appear in the record consider the claimant either "disabled," "unable to work," or "prohibited from doing strenuous and gainful activities" (Dr. Wise, Petersen-Baez, and Romana; Tr. 92, 109, 136). There is little doubt that the fourth physician, Dr. Izquierdo, would have arrived at a similar conclusion had he addressed himself to this precise question (Tr. 132). Although there is a "conflict" in the evidence regarding the claimant's ability to "sit,"*

*Cont'd. from p. 7.

It is common knowledge that spinal-fusion operations are often dangerous and entail much pain and suffering. What kind of surgical operation entailing what danger to life, and pain, must an applicant undergo at the behest of a surgeon who does not suggest any certainty of cure or remedy?

The cases of Burdham v. Celebrezze, 349 F.2d 929 (4th Cir. 1965) and Martin v. Ribicoff, 195 F. Supp. 761, 772 (D. Tenn. 1961) similarly reject claims that back conditions for which a spinal fusion has been mentioned as a possible remedy are classifiable as "remediable."

* This "conflict" tends to dissolve once the factor of pain is considered. See Appellant's discussion of this issue at pp. 37, 8 of his Brief.

The sole basis the Secretary has advanced for resolving this conflict in favor of Dr. Wise over Dr. Petersen-Baez is the former's allegedly superior credentials (Brief for Appellee at 19). Such a consideration is entitled to little if any weight. Mr. Bruno had no choice as to the physicians from whom he would receive treatment at the Hunts Point Center. Undoubtedly if he were not dependent on the Medicaid Program for the treatment he requires he could secure the services of medical personnel whose background and training would be more acceptable to the Secretary. It would be grossly unfair to penalize the claimant for the failure of the medical profession of this nation to distribute equitably its manpower and expertise among the country's various economic classes.

the medical evidence is unanimous in its showing of physical limitations, particularly in regard to his capacity to lift, bend,* or stoop, which prevent him from returning to his former types of employment. The vocational expert conceded (Tr. 58) as does the Secretary (Brief for Appellee at 29, 30) that all conceivable alternative forms of employment would also require him to violate the limitation of no bending. The conclusion that Mr. Bruno is disabled within the meaning of federal law is inescapable.

* The Secretary contends that Dr. Wise merely ruled out "repetitious bending" (Brief for Appellee at 7, 29). The argument is ludicrous. In answer to question #7 on the same form relied upon by the Secretary (Tr. 95), which asks, "Describe any restriction of motion," Dr. Wise replies, in part, "Can't bend forward." Dr. Petersen-Baez says claimant is "unable to bend over" (Tr. 109). Dr. Izquierdo states that "All spinal motions are limited due to spasm and pain present" (Tr. 132; emphasis added). That the Secretary's law judge himself concluded that claimant was incapable of performing any bending movement is clear from his inclusion of this condition in his hypothetical to the vocational expert (Tr. 17, 52; Brief for Appellee at 28, footnote). It is interesting to note that the law judge attempted to neutralize the damaging impact of the vocational expert's testimony under cross-examination by departing from this conclusion and making the finding that claimant cannot "bend more than a few degrees" (Tr. 16; emphasis supplied). However, as indicated, this finding lacks any support in the evidence, substantial or otherwise.

DATED: Bronx, New York
March 16, 1977.

Respectfully Submitted,

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-AGAINST-

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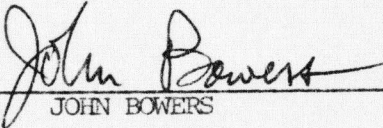
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STATE OF NEW YORK, COUNTY OF BRONX

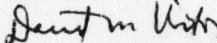
ss:

John Bowers being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at New York, New York.

On March 16, 1977 deponent served the within Reply Brief for Plaintiff Appellant upon Robert B. Fiske, Jr., U.S. Attorney for Southern District New York, attorney(s) for Defendant-Appellee in this action, at One St. Andrews Plaza, New York, New York, the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in --a post office--official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


JOHN BOWERS

Sworn to before me on March 16, 1977.



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